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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



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| In The Matter of | |
| Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services | CC Docket No. 94-54 |



# REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

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## TABLE OF CONTENTS

## Summary

Where facilities-based CMRS providers do not compete in a fully competitive market, the Commission should require such providers to permit direct interconnection of reseller switches with their facilities.

Facilities-based cellular licensees enjoy substantial market power as a result of their duopoly position. Neither wireline local exchange services nor other CMRS services compete with cellular service. Because of their significant market power, the Commission should require facilities-based cellular carriers, like wireline LECs, to provide direct interconnection with their facilities to resellers on reasonable, nondiscriminatory terms.

Such interconnection would result in substantial benefits to the public, but carriers can not be relied upon to enter voluntarily into arrangements for interconnection absent Commission mandate. Experience shows that facilities-based carriers steadfastly resist any resale of, or interconnection with, their facilities, and the Commission has found in the case of wireline LECs that voluntary interconnection will not achieve the public interest goals of mandated interconnection.

Thus, as it has in the wireline local context, the Commission here should require facilities-based cellular carriers and any other service providers competitive with cellular to provide direct interconnection with their facilities on reasonable, nondiscriminatory terms and conditions. Such a mandate would be both "desirable" and "necessary" to advance the public interest, and so would be consistent with the requirements of Section 201(a) of the Act, which authorizes the Commission to order interconnection.

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To the Commission:

# REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA" or the "Association"), by its attorneys and pursuant to the Second Notice of Proposed Rule Making ("Second NPRM") in this proceeding, FCC 95-149 (released April 20, 1995), hereby submits its Reply Comments in response to the Second NPRM and comments filed by other parties in response thereto.

## I. The Commission Should Require Facilities-Based Cellular Providers and other CMRS Providers In Markets That Are Not Fully Competitive to Provide Physical Interconnection of Their Facilities to Switch-Based Resellers on Reasonable, Nondiscriminatory Terms and Conditions.

### A. Where, as in Cellular Service, a Market Is Not Fully Competitive, Mandatory Interconnection Obligations Are In the Public Interest.

Facilities-based cellular providers enjoy significant market power derived from their government-awarded duopoly within their service areas. As TRA has proposed in its initial

Comments in this proceeding,[1] the relevant product and geographic markets for purposes of assessing cellular providers' market power in this proceeding should be defined as the market for all switched wireless voice communications services provided over networks that are fully interconnected with the public switched network within the service areas of facilities-based cellular providers. In other words, the relevant product market should be defined as cellular service and any other existing services that are comparable in technical capabilities and quality to, and competitive with, cellular service.

Comcast Cellular Communications' ("Comcast's") suggestion in this proceeding that cellular carriers compete with wireline local exchange carriers ("LECs")[2] is contrary to fact. Cellular service is a supplement to, not a substitute for, wireline local exchange service.[3] At least one glaring factor accounting for the lack of substitutability of cellular for wireline local service is the significant cost differences between the two.

And the frequently repeated argument that other CMRS providers compete with cellular carriers is untenable. Just last year, the Commission stated that "for purposes of evaluating the level of competition in the CMRS marketplace, the record does not support

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[1] Comments of TRA filed June 14, 1995 ("TRA Comm.") at 18-19 & n. 39.

[2] Comments of Comcast Cellular Communications, Inc. (filed June 14, 1995) ("Comcast Comm.") at 5-6.

[3] In 1991, the Regional Bell Operating Companies, which operate both landline local exchanges and cellular systems, reported to the Commission that any prediction that "mobile services are converging with landline services . . . projects quite a distance in the future. . . . In today's market, the two plainly do not compete." Report of the Bell Companies on Competition in Wireless Telecommunications Services, October 31, 1991, at 184-85 (footnotes deleted). Market conditions today are not significantly different from the situation in 1991, when the BOCs made this report.

a finding that all services should be treated as a single market."[4] The advent of increased competition to cellular providers by broadband PCS providers -- the only service likely to be found even close to substitutable for cellular -- is at best years away.[5] Only a small percentage of PCS licenses have been granted, and only a handful of experimental PCS systems have been built. The vast majority of PCS systems have yet to be constructed and tested, much less marketed; therefore, it is premature to predict the competitive effect that PCS deployment will have on cellular.

Viewing the cellular market alone, *i.e.*, without reference to claimed competition from wireline LECs, PCS or other CMRS providers, it is clear that cellular carriers enjoy significant market power. Indeed, the United States Department of Justice ("DOJ") has asserted that cellular service alone is a relevant product market for purposes of evaluating market power.[6] Moreover, DOJ has concluded that local cellular markets are not competitive, that cellular licensees have substantial market power, and that their control over their facilities is akin to control of bottleneck facilities.[7] It is manifest that cellular carriers at a minimum enjoy a degree of market power in their service areas surpassed only

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[4] Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, Second Report and Order, 9 F.C.C. Rcd. 1411, 1467, ¶ 136 (1994) ("Mobile Services Second R & O"); see also TRA Comm. at 19-21.

[5] Time Warner Comm. at 10-13; MCI Telecommunications Corporation Comments (filed June 14, 1995) ("MCI Comm.") at 2.

[6] Complaint of the Department of Justice in United States v. AT&T, Civ. Action No. 1:94CV01555 (filed July 15, 1993) at ¶ 11.

[7] Memorandum of the United States in Response to Bell Companies' Motions for Generic Wireless Waivers (filed with the U.S. District Court for the District of Columbia July 25, 1994) in United States v. Western Electric, Civ. Action No. 89-0192, at 10, 13, 14-19.

by that of the LECs.

The Commission has consistently mandated physical interconnection for wireline carriers with market power and has already determined that cellular markets are not fully competitive.[8] As it has with wireline carriers such as the LECs, the Commission should mandate nondiscriminatory direct interconnection of cellular facilities on reasonable terms with reseller switches.[9]

The argument that no CMRS provider controls bottleneck facilities as do LECs, and therefore should not be subjected to mandates similar to those applicable to the LECs,[10] is undercut by the Commission's own concept of bottleneck facilities -- which would seem to be on all fours with the market power of cellular carriers within their service areas[11] -- DOJ findings,[12] and recent dicta by the MFJ Court that Bell Operating Company-affiliated cellular carriers control the "mobile bottleneck."[13]

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[8] Second NPRM at ¶¶ 138-39, 154; Mobile Services Second R & O, 9 F.C.C. Rcd. 1411, 1467, ¶ 138 (1994).

[9] See Comments of Time Warner Telecommunications (filed June 14, 1995)("Time Warner Comm.") at 14-17 & n. 26

[10] Comments of Nextel Communications, Inc. (filed June 14, 1995) ("Nextel Comm.") at 9; Comments of Geotek Communications, Inc. (filed June 14, 1995) ("Geotek Comm.") at 7.

[11] Competitive Carrier Rulemaking, 85 F.C.C.2d 1, 21-22 (1980) ("Control of bottleneck facilities is present when a firm or a group of firms has sufficient control over some essential commodity or facility in its industry or trade to be able to impede new entrants [and] the structural characteristics of [the] market [are such] that new entrants must either be allowed to share the bottleneck facility or fail.").

[12] See supra note 7.

[13] United States v. Western Electric, Civ. Action No. 89-0192, 1995 U.S. Dist. LEXIS 5563 (D.D.C. April 28, 1995) at *9.

## B. Imposition of a Mandatory Physical Interconnection Requirement Is "Necessary" and "Desirable" and Therefore Warranted Under Section 201(a) of the Communications Act.

Section 201(a) of the Communications Act requires all common carriers subject to the Act to "establish physical connections with other carriers" where the Commission "finds such action necessary or desirable in the public interest." 47 U.S.C. § 201(a). Under this standard, mandatory interconnection on nondiscriminatory terms and conditions is clearly warranted.

It is widely recognized that unlimited opportunities for resale of CMRS service on reasonable, nondiscriminatory terms and conditions is in the public interest.[14] For example, Time Warner Telecommunications ("TWT") recounts in its Comments how its entry as a resale competitor to the incumbent duopolist carriers in Rochester, New York, inspired the licensed facilities-based carriers in the market to lower their rates and introduce new services.[15] As resale has with respect to other telecommunications offerings, the resale of cellular service has brought numerous advantages to consumers, including lower rates, better service, and expanded service offerings.

Requiring the interconnection of reseller switches will permit resellers to offer lower rates as well as services and functionalities that would be unavailable with switchless resale, such as limited calling areas, incoming call screening, distinctive call signalling, priority call waiting, cellular extension, cellular PBX, cellular centrex, voice mail enhancements, dual-

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[14] See Second NPRM at ¶ 84; see also TRA Comm. at 7-13 (resale of other services is in the public interest) and 14-15 & n.31 (resale of cellular service is in the public interest).

[15] Time Warner Comm. at 1-2.

system access, custom directory service, cellular secretary, multi-line hunting, and advanced billing.[16]

Because physical interconnection of reseller switches with facilities-based cellular carriers' facilities would exponentially increase the array of services and lower the rates cellular resellers could offer, physical interconnection is, *a fortiori*, of even greater benefit to the public than a resale requirement that does not include mandatory interconnection with reseller switches. Clearly, mandatory interconnection with cellular facilities is "desirable" within the scope of Section 201(a).

Mandatory interconnection is also "necessary" to ensure that facilities-based cellular carriers will permit the public to realize the potential benefits of interconnection, because the record discloses widespread hesitancy on the part of such carriers to permit resale -- much less direct interconnection -- absent regulatory intervention. The Commission itself has remarked that "CMRS providers may have incentives to refuse to enter into resale arrangements; absent a Commission-imposed resale obligation . . . the carriers might very well refuse to permit other providers to resell their services"[17] And a number of would-be resellers have been forced to file complaints with the Commission because facilities-based

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[16] Time Warner Comm. at 8-9; TRA Comm. at 30 & nn. 61, 62; see Expanded Interconnection of Local Telephone Company Facilities, 7 F.C.C. Rcd. 7369, 7376-81 (Report and Order and Notice of Proposed Rulemaking) (1992) ("Expanded Interconnection").

[17] Second NPRM at ¶86; TRA Comm. at 33 & n. 67 (citing anecdotal evidence of facilities-based cellular carriers' refusal to cooperate with would-be resellers).

carriers resisted their requests for interconnection on reasonable, nondiscriminatory terms.[18]

Since carriers are inclined to stonewall would-be resellers, it follows that such carrier reluctance would only be more steadfast with respect to requests for direct interconnection in the absence of a specific Commission mandate. Because interconnection would increase the public benefits to be obtained from resale, mandated interconnection is "necessary" to serve the public interest, as required by Section 201(a).

## II. Reliance on Private Negotiations For Interconnection Will Not Bring the Public Interest Benefits of Mandatory Interconnection.

The Commission has suggested that CMRS providers can rely on private negotiations with facilities-based providers for interconnection arrangements, and, even if such negotiations fail to result in interconnection, would-be CMRS resellers could always achieve "virtual interconnection" through the LECs.[19] This view is incorrect and will disserve the public interest if adopted.

As noted previously, facilities-based carriers are loathe to permit resale -- not to mention direct interconnection -- absent legal compulsion; therefore, reliance solely on private negotiations to achieve interconnection will, at best, only enable facilities-based CMRS providers to raise their would-be rivals' costs by forcing the newcomers to interconnect only through the LECs, which will predictably be more costly than direct

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[18] *E.g.*, Cellnet Communications, Inc. v. New Par, Inc., d/b/a Cellular One, File No. WB/ENF-F-ENF-95-010, filed Feb. 16, 1995; Nationwide Cellular Service, Inc. v. Comcast Cellular Communications, Inc., File No. WB/ENF-F-ENF-95-011, filed Feb. 16, 1995 (both cited in Second NPRM at note 197); Continental Mobile Tel. Co. v. Chicago SMSA Limited Partnership, File No. E-92-02 (filed Oct. 9, 1991) (cited in Mobile Services Second R & O, 9 F.C.C. Rcd. 1411, 1499, n.481.

[19] Second NPRM at ¶¶ 30-31, 37; see Nextel Comm. at 3.

interconnection with CMRS providers themselves.[20]

While it may be true in that two existing facilities-based CMRS providers would have a business incentive to enter into voluntary interconnection arrangements, where a would-be provider seeks to enter the market by interconnecting with the facilities of an incumbent provider, the incumbent provider will have no competitive incentive to interconnect with the newcomer. Thus, one of the policies served by mandatory interconnection -- entry by new competitors – would be neglected by relying solely on voluntary interconnection agreements.

Moreover, when a prospective CMRS reseller attempts to enter the market by negotiating a private interconnection agreement with another CMRS provider that is affiliated with a LEC, the risk of unreasonable terms and conditions of interconnection would be even greater because of the enormous disparity in market power between the prospective reseller and the established LEC-affiliated provider.[21] The Commission itself has recognized the potential for this type of anticompetitive LEC activity,[22] which could occur wherever a LEC controls one of the incumbent CMRS providers in a market, and all other potentially competitive CMRS providers will almost necessarily have significantly less market share than the LEC affiliate.[23]

In this regard, Commission Chairman Hundt recounted last fall the Commission's

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[20] American Personal Communications (APS) Comm. at 2-3. Second Notice of Proposed Rulemaking in CC Dkt. 94-54 (2d NPRM) at ¶ 32.

[21] APS Comm. at 4.

[22] Second NPRM at ¶ 32.

[23] APS Comm. at 3-4; see Comcast Comm. at 3-4.

experience with expanded interconnection with wireline local carriers and the resistance it encountered from the LECs that would be subject to the interconnection requirements:[24]

> We're great believers in expanded interconnection. It fosters competition, leading to lower long distance rates, more consumer choice, increased technological innovation, investment in advanced technologies and greater economic growth.
>
> So the Commission decided to require local exchange carriers to provide expanded interconnection. The LECs objected, taking us to the Court of Appeals and winning. But we were able to continue to work toward our goals by directing local telephone companies to provide expanded interconnection through virtual, instead of physical, collocation.
>
> Two lessons there: first, competition doesn't come by itself; it often takes a fight. Second, like all fights worth fighting, it has to be won.

In the course of the expanded interconnection "fight" described by Chairman Hundt, the Commission rejected the BOCs' argument (foreshadowing the same argument raised in this proceeding) that voluntary arrangements would be satisfactory for establishing terms of interconnection, and that the Commission therefore needed only to articulate principles of general applicability, stating:[25]

> We believe that adoption of certain standards will bring faster implementation of expanded interconnection by clarifying the rights and obligations of the LECs and interconnectors. This should greatly reduce the number of disputes arising during the implementation process. Adopting only general principles would only leave the process of defining those general guidelines to future proceedings with the likelihood of substantial delay.

In like manner, reliance on general principles and voluntary implementation of those

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[24] Remarks of Chairman Reed Hundt before the Networked Economy Conference (Washington, D.C., September 26, 1994), 1995 FCC LEXIS 4936 at * 9.

[25] Expanded Interconnection, supra, note 16, 7 F.C.C. Rcd. at 7405-06, ¶¶ 70-72.

principles in the context of cellular interconnection would be inappropriate and would delay the availability of public benefits unnecessarily. Thus, the Commission should not leave interconnection to private negotiation, but should articulate specific mandatory interconnection requirements.

## III. Mandating Physical Interconnection With Cellular Facilities In This Proceeding Is Consistent with Commission Precedent and Administrative Procedure.

Comcast has argued (a) that the Commission can not order CMRS providers to provide physical interconnection to reseller switches absent a duty to interconnect; (b) that no such duty arises absent a Commission order after the opportunity for a hearing; and (c) that, absent such a hearing, carriers are entitled to use their "business judgment" in determining whether to interconnect with other carriers.[26] Given the fact that Comcast is the respondent in a complaint proceeding alleging it has wrongfully refused to interconnect its facilities with a reseller,[27] Comcast's self-serving motivation for making this argument is obvious.

True, the Commission should declare an obligation to interconnect before it attempts to enforce such an obligation through an adjudicatory complaint proceeding; but this notice-and-comment rulemaking proceeding is the ideal forum for establishing a generally applicable duty to interconnect. Indeed, a long line of Commission interconnection precedent supports proceeding in this docket to adopt rules of general applicability rather than proceeding on a case-by-case basis, as necessitated by aggrieved

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[26] Comcast Comm. at 11-14.

[27] Nationwide Cellular Service, Inc. v. Comcast Cellular Communications, Inc., File No. WB/ENF-F-95-011 (filed Feb. 16, 1995).

carrier complaints.[28]

Comcast makes a persuasive argument that the Commission can not properly allow parties to challenge carrier refusals to interconnect in complaint proceedings, as it proposes to allow (Second NPRM at ¶¶ 38-40, 43), in the absence of a duty to interconnect.[29] But this point further underscores the importance of articulating specific interconnection requirements in this proceeding, rather than relying on voluntary negotiations and the complaint process to protect and advance the public interest.

If the Commission determines here that a general physical interconnection requirement is in the public interest after giving all interested parties an opportunity to participate, the rule of general applicability would satisfy the public interest and hearing requirements of Section 201, would have the force of law, and would be enforceable in a complaint proceeding under Section 208 of the Act.[30]

Indeed, it would constitute an impermissible departure from relevant Commission interconnection precedent for the Commission not to require direct, unbundled interconnection under the circumstances present today in cellular markets. In the wireline context, the Commission has held that new market entrants should not be required to purchase service elements from dominant carriers which the nascent competitors do not

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28 See cases cited in Comcast Comm. at 17-19 & nn. 52-56.

29 Comcast Comm. at 19 & n. 56.

30 Time Warner Comm. at 21.

need to compete.[31] Similarly, resellers of cellular service should not be forced to purchase bundled service elements that they do not need to resell cellular service. To allow cellular carriers – carriers with significant market power – to avoid unbundling and related interconnection obligations while holding similarly situated wireline carriers with market power to such requirements would be a departure from past Commission policy and would require a detailed explanation of the agency's change in position.[32]

## IV. Arguments Against Mandatory Interconnection Are Specious, Self-Serving, and Sensationalistic.

Certain facilities-based CMRS provider interests have asserted that direct interconnection of resellers' switches with those of CMRS providers is technically infeasible.[33] At least in the cellular industry, this argument does not hold water. For example, Time Warner Telecommunications ("TWT"), a cellular reseller, has reported that several leading cellular carriers and equipment manufacturers have informed TWT that physical interconnection is feasible, based on 10 years of roaming interconnection

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[31] E.g., Filing and Review of Open Network Architecture Plans, 4 F.C.C. Rcd. 1 (1988); Expanded Interconnection with Local Exchange Telephone Company Facilities, 8 F.C.C. Rcd. 7374 (1993). See also Time Warner Comm. at 19 & n. 37.

[32] Petroleum Communications, Inc. v. FCC, 22 F.3d 1164, 1172 (D.C. Cir. 1994); see Time Warner Comm. at 16 & n. 31. In addition, requiring cellular carriers to direct physical interconnection of reseller switches with their facilities in a manner analogous to the interconnection requirements imposed on the LECs would be consistent with the goal embodied in the Omnibus Budget Reconciliation Act of 1993 of achieving regulatory parity among similarly situated categories of common carriers. See H.R. Rep. No. 2264, 103d Cong., 1st Sess. at 259; 47 U.S.C. § 332(c)(1)(A).

[33] *E.g.*, APS Comm. at 11-12.

experience.[34]

There are at least three viable existing technical proposals for direct interconnection with cellular carriers' facilities, advanced respectively by TWT (developed with input from several cellular carriers and equipment manufacturers),[35] Cellular Systems, Inc.,[36] and the National Cellular Resellers Association ("NCRA").[37]

Moreover, TWT has disputed the oft-invoked argument that direct interconnection would impose significant costs on facilities-based providers.[38] And while it has not been conclusively shown whether and to what extent mandated interconnection and unbundling would impose costs on cellular carriers, even if such costs exist, they could be recovered by direct pass-through to resellers, not to mention being offset by increased revenues from greater utilization of incumbent carriers' facilities.[39]

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[34] Time Warner at 4-5. For years, a number of cellular switch manufacturers have offered interconnection capability for licensees in adjacent geographic areas, using technology such as Motorola's Distributed Mobile Exchange and intersystem operations standardized by the Telecommunications Industry Association. Time Warner Comm. at 5.

[35] Time Warner at 6-7, n. 7 & Exhibit 1.

[36] CIS's plan has been approved by the California Public Utilities Commission. 138 P.U.R. 4th 45 (1992).

[37] See Comments of NCRA filed in this docket on September 14, 1994, at Exhibit A.

[38] Time Warner Comm. at 5. And the related argument that Commission administration of mandatory interconnection rules would be costly is contradicted by the nominal cost to the Commission of administering the LEC interconnection requirements; and, even if such costs were more than nominal, they would be well justified by the benefits to the public from increased competition, lower rates, and broader ranges of service offerings.

[39] Time Warner Comm. at 4 & n. 3.

In short, while cellular facilities-based carriers may incur some costs in providing unbundled service -- as LECs subject to expanded interconnection requirements do -- the solution is not to reject unbundling summarily, but to permit facilities-based cellular carriers to pass their costs through directly (without mark-up) to interconnecting carriers, just as LECs do.[40]

## CONCLUSION

Mandatory direct interconnection on reasonable, nondiscriminatory terms and conditions should be imposed on cellular providers and any providers of CMRS services competitive with cellular service. Direct interconnection will bring numerous public benefits including lower rates, new services, and greater market entry. In the absence of an interconnection mandate, facilities-based carriers will continue to stonewall resellers requesting interconnection. Thus, mandatory direct interconnection is both desirable and

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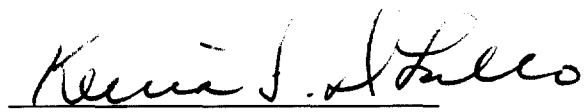
[40] See Time Warner Comm. at 20 & n. 39.

necessary to advance the public interest and satisfies the requirements of Section 201(a) for such a mandate.

Respectfully submitted,

**TELECOMMUNICATIONS RESELLERS ASSOCIATION**

By: 

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